IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 59 OF 1998.

Shri Pandurang Bablo Kanolkar,
aged about 60 years,
agriculturist, r/o Nanora,
Bicholim, Taluka. ... Appellant
(Orig. Plaintiff)

VERSUS

1. Antonio Francis D'Souza.

2. Jose Francis D'Souza,
major, businessman,
both r/o Dangyachiwadi,
Nanora, Bicholim, Goa. ... Respondents
(Orig.Defendants)

Shri S.R. Rivonkar, Advocate for the Appellant.

Shri V.R. Tamba, Advocate for the Respondents.

CORAM: N.A. BRITTO, J.

DATE: 26TH MARCH, 2004.

ORAL JUDGMENT:

The appellant herein was plaintiff in S.C.S. No.92/91 and his said Civil Suit for recovery of damages with the allegation that the defendants set fire to his house has been dismissed by the learned Civil Judge, Senior Division, Bicholim and the plaintiff is now before this Court in appeal against the same.

2. The parties hereto shall be referred in the names as they appear in the cause title of the said

Civil Suit.

3. Briefly stated it was the case of the plaintiff that he was a tenant of a property surveyed under No.488/3 where he had his residential house/farm building and was residing there along with his wife and which was his farmhouse. The plaintiff stated that in the last week of October, 1989 he had sold his bullock cart and the bullocks for Rs.6500/- and out of that Rs.6000/- he had kept in the said house to purchase a new pair of bullocks. The plaintiff stated that on 10.12.89 at about 7.00 p.m. the plaintiff along with his wife had gone to the house of his son staying at Pistem wado to take dinner and after dinner they were returning home and when they reached at a distance of 50 metres from the suit house they saw the defendants and four other unknown persons with glowing/burning dry palm leaves (chud) in their hands, putting on fire to the suit house and the plaintiff immediately rushed to the suit house and called for help and the defendants ran away after hearing the sound of the plaintiff.

4. The plaintiff stated that the walls of the suit house were made of masonry stones and the suit house had a roof of palm leaves and rafters and the

plaintiff, his wife and two other villagers reached at the spot and tried their level best to save the suit house from fire, but the plaintiff's efforts did not succeed and articles listed by the plaintiff including the cash of Rs.6000/- were totally burnt in the fire.

5. The plaintiff stated that he lodged a complaint with the Bicholim Police Station, but no action was taken by the police against the defendants and thereafter the plaintiff filed a private police complaint against the defendant in the Court of J.M.F.C., Bicholim, which is pending.

6. The plaintiff stated that he has every right to possess and enjoy the suit house and the defendants have no right of any kind in the suit property and the suit house. The plaintiff stated that he had constructed the said house by spending his money and the defendants have intentionally put fire to the said house with ulterior motive of harassing him to force him to leave the suit property and the unauthorised acts of the defendants have put the plaintiff in heavy loss. The plaintiff stated that he was entitled to recover damages of Rs.16,000/- for the articles as per list, Rs.6000/-

of cash and Rs.10,000/- for mental shock, pain, loss of work in the farm and in all Rs.32,000/-. The plaintiff stated that the cause of action for filing the suit arose on 10.2.86 when the defendants have put fire to the house of the plaintiff.

7. The defendants contested the suit and stated that the same was frivolous, bad in law and that it was filed on false facts and imaginary cause of action. The defendants stated that the plaintiff had also filed a false complaint against the defendants some years back in the Police Station and the Executive Magistrate had dropped the proceedings. The defendants stated that the plaintiff instigated the landlord/landlady of the property bearing Survey No.488/1 and others of village Nanora against the defendants and their father and forcibly tried to evict them from the said property inspite of the fact that the father of the defendants was their tenant and consequently there was litigation pending before the Court and before the Mamlatdar and the brain and cause behind the said litigation was the plaintiff. The defendants stated that there were a series of complaints falsely lodged by the plaintiff against the defendants and their father at the Police Station. The defendants also stated that suit was

barred by limitation.

8. The defendants admitted that there was a property surveyed under No.488/3, but whether the plaintiff was a tenant of the same was unknown to the defendants. The defendants stated that the plaintiff was a permanent resident of ward Pistem of Nanora village and he and his family were residing there and to the knowledge of the defendants there was no house or so called farmhouse in the suit property nor such structure ever existed. The defendants stated that the plaintiff and his son resided with one lady at Pistem permanently for the last 20 to 30 years and his wife and children are residing in a house situated at Kanolwadi at Nanora. The defendants stated that the plaintiff had lodged a false complaint against the defendants and that the plaintiff under one pretext or the other and with ulterior motives has filed false complaints against the defendants.

9. The learned Civil Judge, S.D., framed several issues. However two findings given by the learned Civil Judge Senior Division are challenged in the present appeal. The first is regarding the existence of the suit house of the plaintiff which was covered

by issue No.2 and the second is whether it is the defendants who set fire to the said house of the plaintiff which was covered by Issue No.3.

10. Regarding the existence of the house, learned Advocate Shri Rivonkar, on behalf of the plaintiff, has submitted that the plaintiff had proved the existence of the same by ample evidence on record though the plaintiff might have not pleaded about the house number in the plaint. With the assistance of the learned Advocate Shri Rivonkar, the evidence led by the plaintiff has been read by me and I find that there was not at all any difficulty in rendering a finding that the house existed in the property surveyed under No.488/3 though the existence of the said house was not shown in Form I and XIV.

11. It has been submitted by learned Advocate Shri Tamba that in terms of Order 7, Rule 3 it was necessary for the plaintiff to have given the house number in the plaint, but however the fact remains that the identity of the said house was never in dispute. The plaintiff (P.W.1) had described his house in para 6 of the plaint and where it was referred to as a farmhouse or a hut was not of much significance as long as the said structure was

existing in the said property occupied by the plaintiff. The Plaintiff (P.W.1) himself had stated that he had a house built of stones with timber and roof and initially the roofing was of palm leaves. P.W.2 Laxmikant Khandolkar, son of P.W.1 had also stated that they were residing in the said property belonging to one Kamlakant R. Bhonsule and the house was constructed by them. P.W.3 Rajendra had confirmed that he had seen the burnt hut. P.W.4 had also stated that the house of the plaintiff was burnt. P.W.5 was the Sarpanch of the Village Panchayat who had issued the certificate (Exh.PW5/A) certifying that the house No.89 belonged to the plaintiff and if at all she could not confirm the contents of the said certificate (Exh.PW5/A) but the same was got subsequently confirmed by P.W.6 who was the Secretary of the said Village Panchayat. The said Secretary Ramchandra had stated that from he records of the Panchayat of the year 1964 he had found that the house of the plaintiff was registered there. On the contrary, the defendants had impliedly admitted the existence of the said house by suggesting to the plaintiff that the said house did not belong to him and that he had not produced any document in respect of the same. Again it was suggested to the plaintiff that there was no house in

the property prior to 1989. It was not the case of the defendants that the plaintiff built the house after the first house got burnt. It was also required to be noted that the Police had registered a F.I.R. in connection with the incident of setting fire and had prosecuted the defendants as accused in the said case. The evidence on record abundantly proved that the plaintiff did have a structure, whether it was to be called a house or hut being immaterial, in the property in which he was residing as a tenant. Issue No.2 ought to have been answered in the affirmative by the learned Civil Judge S.D. The conclusion arrived at by the learned Civil Judge S.D. that the plaintiff had failed to prove the existence of house/farmhouse therefore requires to be disturbed.

12. As far as the second finding is concerned, the learned Advocate Shri Rivonkar has submitted that the learned Civil Judge, S.D., has not at all considered the evidence of the plaintiff, who had deposed on oath and it was necessary for the learned Civil Judge, S.D., to have discussed his evidence by giving some reasons.

13. On the other hand, learned Advocate Shri Tamba

has referred to the case of **Madhusudan Das v. Smt. Narayanibai (deceased) by L.RS. and others** [(1983) **1** S.C.C., 35] and has submitted that the Trial Court had a benefit of enjoying the advantage of the evidence of the witnesses and therefore the conclusion arrived at by observing the said witnesses should not be lightly disturbed. It has been held in the said case of Madhusudan that in an appeal against a trial court decree, when the appellate court considers an issue turning on oral evidence, it does not enjoy the advantage which the trial court had in having the witnesses before it and of observing the manner in which they gave their testimony. When there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the appellate court should permit the findings of fact rendered by the trial court to prevail unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the trial court or there is a sufficient balance of improbability to displace its opinion as to where the credibility lies or the appraisal of the evidence by the trial court suffers from a material irregularity or is based on inadmissible evidence or on a misreading of the evidence or on conjectures and

surmises. "

14. The very case pleaded by the plaintiff appears to be highly improbable. In the plaint the plaintiff stated that when the plaintiff and his wife reached at a distance of 50 metres from the suit house they saw that the defendants and four other unknown persons with burning dried palm leaves and were putting fire to the suit house. Did the plaintiff by the said pleading wish to convey that each of the said six persons were carrying burning dried palm leaves in their hands and putting fire to his house? Admittedly, the incident took place in the night and from that distance of 50 metres it would not have been possible for the plaintiff to identify any of the persons, in case he saw those persons at a time setting fire to his house. The plaintiff in his evidence stated that he saw both the defendants lighting fire with the help of chud and that the four other persons were standing by the side of their house whom he could not recognise. Here again does the plaintiff wish to convey that each of the defendants had "chud" in their respective hands and were setting fire to his house. As rightly observed by the learned Civil Judge, S.D.,the plaintiff has not examined his wife to corroborate his version.

The plaintiff stated in the plaint that he had reached the place with two other villagers who had tried their level best to put off the fire but did not mention the names of the said villagers. P.W.2 Laxmikant is the son of plaintiff and he cannot be termed as an eye witness because at the time of the incident he was not near the scene but at Pistem and it is he who, on the next day, lodged a complaint to the Police. The only person who has been examined by the plaintiff as an eye witness is P.W.4 Sagun Ghadi. He has stated that he had gone to his sister's house at Uspa and at about 5.00 p.m. was waiting for the bus at Nadora but as the bus did not come he was going to his house on foot and met the plaintiff on the way. The plaintiff himself has whispered not a word about meeting anyone on his way back home from the house where his son was residing. According to P.W.4 Sagun when he met plaintiff on the way the plaintiff stated: "Dhanva as his house was set on fire". Here again it may be observed that in case the plaintiff and P.W.4 Sagun were at a certain distance from the house from where they saw the fire, none of them would have been in a position to identify the person or persons who set fire to the house. Again P.W.4 Sagun has stated that the wife of the plaintiff was there. Here it is to be noted that

the plaintiff himself stated that he was returning with his wife and if that was so, the wife of the plaintiff could not have been at home prior to the plaintiff and P.W.4 Sagun reached the house, after seeing the house on fire while they were on the way to the said house. P.W.4 Sagun next stated that he saw two persons running from near the house of the plaintiff. P.W.4 Sagun does not mention in which direction the said two persons ran away and it is in evidence of D.W.1 that in between the house of the plaintiff and the house of the defendants there is a wall of about a metre in height. It is difficult to believe that both the defendants would run elsewhere and not to their house in case if at all they had set fire to the house of the plaintiff. However, P.W.4 Sagun admits in cross-examination that the said two persons ran with their backs towards them and they did not see their faces, and, therefore there is no question of P.W.4 Sagun ever having identified both the defendants as the persons who set fire to the house of the plaintiff. It is to be noted that P.W.4 Sagun makes no reference to the other four persons who are alleged to have been present along with the defendants. The only relevant statement made by P.W.4 Sagun is that Sakubai (wife of plaintiff) referring to one Anton said that he should not say on

the next day. Firstly, it must be observed that this part of the story is not at all narrated by the plaintiff himself and unless the said Sakubai was examined the said story need not be accepted. It appears that P.W.4 Sagun is a tutored witness who has been examined by the plaintiff to support his case. The evidence of the plaintiff is not at all corroborated and likewise the evidence of P.W.4 Sagun and therefore there was no question of accepting their evidence which, otherwise, appears to be improbable. It could not be accepted only because they had stated the facts on oath before the Court.

15. In my opinion, the second finding rendered by the Civil Judge Senior Division could not be faulted Hence I make the following Order:

16. The appeal is hereby dismissed. Considering the facts, there will be no order as to costs.

N.A. BRITTO, J.

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